

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-1018

ONLY COPY AVAILABLE
UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

B
Pg 5
7cc

Docket No. 75-1018

UNITED STATES OF AMERICA,

Appellee,

-against-

PETER M. BEKENY,

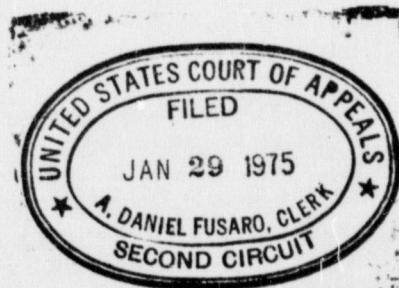
Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

Arthur M. Boal, Jr.
Assigned Counsel for
Defendant-Appellant,
Peter M. Bekeny
225 Broadway
New York, New York 10007

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE

Saylors
5/8/73

Case No. 1-17

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U.S.:

vs.

PETER M. BEKENY - all counts

JOHN W. NIELDS, JR., AUSA

KENNETH GLASSMAN - Cts. 1-17 & 9/25/73

AMERICAN BUSINESS INDUSTRIES
INTERNATIONAL, Inc. - Cts. 1-17

For Defendant:

| STATISTICAL RECORD | COSTS | DATE | NAME OR RECEIPT NO. | REG. |
|--|------------|---------|------------------------|------|
| U.S. 2 mailed ✓ | Clerk | 5/17/73 | Glenn Miller | 100 |
| U.S. 3 mailed 2/1/73 | Marshal | 5/17/73 | Miller | 0 |
| NY Comp. #70-3497 | Docket fee | | | |
| 18 | | | | |
| 1241 & 1323 mail the mails in a scheme intended to defraud (cts. 1-17) jury before Grand Jury (s. 18-21) | | | | |
| TWENTY-ONE COUNTS | | | | |

DATE

PROCEEDINGS

4-12-71 Filed Indictment.

4-12-71 Indictment ordered sealed. Warrants of arrest ordered.

MAY

4-12-71 E/m(2) issued

4-14-71 Indictment ordered unsealed.

PETER M. BEKENY - Deft. brought to court on warrant. Deft. found guilty. Case assigned to Judge Croake for all purposes. No trial date set. Bail fixed in the amount of \$15,000 PRB to be paid by \$1,500 (10%) cash. Condition of bail being that the defendant US Atty 5 days in advance of any trip he will make outside of New York City. Deft. released on own recognizance until 4PM on 4-16-71 at which time bail is to be posted. Deft. ordered photographed & fingerprinted.

HOME

4-12-71 PETER M. BEKENY

AMERICAN BUSINESS INDUSTRIES INTERNATIONAL

) Filed notice of appearance by
Julian Devenberg, 50 Court St.,
Brooklyn, N.Y. U1-5446

D. 323

PROCEEDINGS

CRIMINAL DOCKET

DATE

PROCEEDINGS

| | |
|----------|---|
| 11-20-73 | Bekeny- Filed affidavit and notice of motion for an order granting the deft time to obtain an atty and trial date. |
| 1-2-73 | Glassman- Filed consent to change attorney (Barry G. Bell, Esq. 299 Dway New York, N.Y. (Tel. 233-3638) So ordered. Croake, J. 1/1/73 |
| 1-4-73 | Glassman- Filed CJA Form 4 (Old) approving payment to Atty. Theo. Krieger.... Croake, J. |
| 10-11-72 | Docketed notice of motion (application) for an order permitting and consenting Julian Dennenberg, Esq., to withdraw his appearance as counsel for defendants Peter M. Bekeny and American Business Industries, Inc. |
| 2-13-73 | Bekeny and American Industries, Inc. Filed memo. endorsed on counsel's motion(application to withdraw as counsel. "Motion denied. So ordered. Croake, J. (see file)(n/n) |
| 6-18-73 | Bekeny- Filed CJA appointment of John Corbett 66 Court St. Brooklyn 875-1977 Gagliardi, J. |
| 6-18-73 | Filed Government's supplemental bill of particulars. |
| 6-18-73 | BEKENY- Filed CJA appointment of John C. Corbett 66 Court Street Brooklyn 11201 875-1975 |
| 6-21-73 | Glassman- Filed appointment of counsel of Barry G. Bell under CJA. Gagliardi, J. |
| 6-21-73 | Jury trial begun before Gagliardi, J. |
| 6-22-73 | Trial continued. |
| 6-23-73 | Trial continued. |
| 6-26-73 | Trial continued. |
| 6-27-73 | Trial continued. |
| 6-28-73 | Trial continued. |
| 6-29-73 | Trial continued. Counts 1,3,4,5,6,7,10,15 & 17 dismissed as to All Defendants. |
| 7-2-73 | Trial continued and concluded. Jury verdict: (see over) |

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Page #4

JUDGE CAGLIARDI

71 CRIM 234

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DATE

PROCEEDINGS

Bekeny- Guilty on cts. 2,8,9,11,12,13,14,16,18,19,20 & 21.

Pre-sentence investigation ordered. Sentence adjourned to 9-12-73 at 9:30 A.M. Present bail continued until date of sentence. Bail limits extended to SDNY, EDNY and New Jersey.

A.D.L.I.-Guilty on cts. 2,8,9,11,12,13,14 & 16. Pre-sentence investigation ordered. Sentence adjourned to 9-12-73 at 9:30 A.M.

Glassman-Guilty on cts. 14 & 16.- Deft's motion to dismiss counts 2, 11, 12 & 13. Granted. Pre-sentence investigation ordered. Sentence adjourned to 9-12-73 at 9:30 A.M. Deft. continued R.G.R. until date of sentence.

Cagliardi,J

7-7-73 BEKENY- filed CJA 23 financial affdvt.

7-10 PETER M. BEKENY - Filed deft. notice of motion for re-argument of motion to dismiss.

7-10 PETER M. BEKENY - Filed deft's memo of law.

8-7-73 PETER M. BEKENY- filed transcript of record of proceedings dcd 12-10-73.

8-7-73 KENNETH GLASSMAN- filed affdvt of Barry Bell, Esq. re: detail of service.

8-7-73 KENNETH GLASSMAN -filed CJA form 20 authorization of payment for fees of atty Barry G. Bell. mm Cagliardi,J. - mailed-copies

8-27-73 GLASSMAN -filed consent to substitute atty. new counsel: Gasthalter Pollack, 233 Bway, NYC so ordered Cagliardi,J. mm

9-27-73 Filed deft Glassman's notice of motion re: pre-sentence investigation.

9-25-73 KENNETH GLASSMAN- (atty present) filed JUDGMENT. It is adjudged that the deft is sentenced as a YOUNG ADULT OFFENDER pursuant to Sec. 72-B of the Juvenile Court Act of 1970, U.S. Code, as extended by Sec. 4209 of T. 18 U.S.C. The imposition of sentence is suspended and the deft is placed on probation for a period of TWO (2) YEARS, subject to the standing probation of this court. The deft is FINED \$500.00 on count 14 and \$500.00 on count 16. The total fine of \$1,000.00 is to be paid in six (6) installments from today. CAGLIARDI,J.

10-4-73 Filed Govt's affdvt in opposition to the motion of deft Bekeny for a new trial.

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71 Cr 234

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Judge Gagliardi

Page 5

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DATE:

PROCEEDINGS

Filed afflvs in support to John C. Corbett's motion of 9-27-73.

AMERICAN BUSINESS INDUSTRIES INTERNATIONAL, INC. - (atty present)

It is adjudged that the deft is guilty as charged and convicted. It is adjudged that the deft is fined \$1,000. on each of counts 2, 6, 9, 11, 12, 13, 14, 16. Total fines of \$8,000. Gagliardi, J.

10-12-73 Issued commitments.

0-11-73 PETER M. BEKENY- (atty present) It is adjudged that the deft is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of EIGHTEEN (18) MONTHS on each of counts 2, 8, 9, 11, 12, 13, 14, 16, 19, 20, 21 concurrently.

Deft is conc'd on present bail pending appeal. Gagliardi, J.
10-12-73 issued commitments.

0-11-73 PETER BEKENY- filed notice of appeal from judgment dtd 10-11-73.

Deft permitted to appeal in forma pauperis. Gagliardi, J.

10-12-73 Filed Trial transcript of record of proceedings dtd May 31-73.

10-20-73 PETER BEKENY- Filed Notice of motion for a new trial for deft. pursuant to R. 33 FRCP.

: June 24, 25, 26, 27, 28-73

: June 29-73

11-14-73 PETER M. BEKENY ET AL.: Filed NOTICE TO THE DOCKET CLERK: Supplemental record on appeal has been transmitted to the U.S.C.A. for the Second Circuit.

10-31-73 Bekeny- Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.

11-20-73 Filed Transcript of record of proceedings, dtd Oct. 11, 1973

11-20-73 PETER M. BEKENY: Filed Copy 2 of CJA 20 APPOINTMENT (attached to AFFIDAVIT OF SERVICES). Approved for payment by Judge Gagliardi. Amount approved: \$1,644.84. Payee: John C. Corbett [66 Court Street, Brooklyn, N.Y. 11201]

Nov. 20-73 BEKENY: Filed CJA 20 appointment of Counsel: JOHN C. CORBETT 66 Court St., Brooklyn, N.Y. 11204, Gagliardi, J.

10-12-73 BEKENY: Docketed

12-26-73 PETER M. BEKENY et al.: Filed Copy 5 of XK CJA 21 AUTHORIZATION (ATTORNEY for transcript for appeal). Approved for payment: (signature not legible). Amount approved: (not XK legible). Payee: Southern District Court Reporters.

1-6-74 : 7/25/73

1-17-74 PETER BEKENY- filed CJA form 21 authorization for payment of expenses services of Court Reporters. Gagliardi, J. m

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CERTIFIED EXCEPCT

Page 6

JUDGE GAGLIARDI

D.L.T.B.

PROCEEDINGS

- 2-6-74 P.Bekeny - Filed Notice of Motion re: set aside judgment dtd 10-21-73.
- 2/21/74 Filed Govt's -Affdvt- re: opposition to deft Bekeny's Motion for order setting aside judgment of conviction.
- 2/21/74 Filed Govt's -Memo of law- in opposition to motion for order setting aside judgment of conviction.
- 2/24/74 Filed deft Bekeny's affdvt re: in partial answer to the motion filed by deft Bekeny 28: 2255.
- 3/19/74 Filed MEMO-END, on motion dtd 2/8/74, Motion for stay of execution or bail pending disposition of motions under 28 USC 2255 denied for reasons set forth on record. The 2255 application will be heard and determined after case returned to this court from U.S. Supreme Court. Motley, J.mn
- 3/74 Filed truecopy of order of the USCA that the judgment of the dist. ct. is affirmed. Fusaro, Clerk mn
Judgment entered 3/21/74 Clerk mn
- 10/6/74 Judgment #73-832 final and satisfied and entered in L.J. 3/21/74
- 11/9/74 P.BEKENY Filed complaint for damages,訴訟状提出,訴訟代理人 3/19/74 (F.A.)
- 11/11/74 Filed true copy of 2255 dtd 4/27/74 of the Supreme Court of the U.S., petition for writ of certiorari in dismissed.
- 11-18-74 PETER BEKENY - Adjourned 2:00.
- 11/23/74 P. Bekeny- filed notice of motion under rule 35.
- 11/24/74 Filed OPINION 41463-...deft. Bekeny's motions are denied.Govt's
- 11/29/74 Filed deft. P. Bekeny's notice of appeal from order denying the motion of deft. for a new trial entered in this action on 11/24/74.
- 12/1/74 Filed deft. Peter Bekeny's motion for leave to appeal in forma pauperis.

A-TEN
REVIEWED
APR 19 1975
M. S. G.

(G)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PETER M. BEKENY, KENNETH GLASSMAN
and AMERICAN BUSINESS INDUSTRIES
INTERNATIONAL, INC.,

71 Crim. 234

L.P.G.

Defendants.

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavits of PETER M. BEKENY, sworn to the 25th day of January, 1974 and of ARTHUR M. BOAL, JR., sworn to the 5th day of February 1974, the Defendant, PETER M. BEKENY, a motion will be made on the 19th day of February, 1974 before the Honorable EUGENE P. GAGLIARDI at a Motion Term to be held at the United States Courthouse, Foley Square, New York, New York, to set aside the verdict returned in the above entitled action on July 2, 1973 and the judgement entered thereon on October 11, 1973, and to grant a new trial under Title 28, United States Code Section 2255 upon the grounds that the defendant was denied effective assistance of counsel and under Rule 33 of the Federal Rules of Criminal Procedure upon the grounds of newly discovered evidence of which the defendant was ignorant at the time of the trial herein and which he could not have sooner discovered in the exercise of due diligence, all of which more fully appears from the affidavit of the Defendant, PETER M. BEKENY, sworn to the 25 day of January, 1974 and ARTHUR M. BOAL, JR., sworn to the 5 day of February, 1974, attached hereto or, alternatively, that this application be set down for hearing and that the defendant be produced for such hearing.

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BOAL, BOAK & LARSEN

By

Arthur M. Boal, Jr.

Arthur M. Boal, Jr.
Attorney for Defendant
Office & P. O. Address
225 Broadway
New York, New York 10007
233-2500

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TO: HONORABLE PAUL CURRAN
United States Attorney
Southern District of New York
Foley Square
New York, New York

JOHN C. CORLETT, ESQ.
Assigned Counsel for Defendant
66 Court Street
New York, New York 11201

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CLERK'S OFFICE
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

Plaintiff, : 71 Crim. 234

-against-

PETER M. BEKENY, et al.,

: AFFIDAVIT IN SUPPORT OF
MOTION FOR A NEW TRIAL

Defendant.

-----X

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

PETER M. BEKENY, being duly sworn, deposes and says:

1. That he is the above named defendant. That he executes this affidavit in support of his motion for a new trial based upon the absence of effective assistance of counsel when the matter was tried before the HONORABLE LEE P. CAGLIARDI and a jury on June 21 to July 2, 1973, and upon the grounds of newly discovered evidence.

2. That upon reference to the Docket of this Court, the following information with respect to deponent's counsel will be found:

(a) JULIAN DENENBERG. On April 19, 1973, five days after deponent's arraignment, Mr. Denenberg filed a notice of appearance on behalf of defendants, ALIMENTUM BUSINESS INDUSTRIES INTERNATIONAL, INC., and PETER M. BEKENY. October 11, 1973, Mr. Denenberg applied to the Court for permission to withdraw as counsel for each of the defendants. On February 13, 1973, Mr. Denenberg's motion was denied by the HONORABLE THOMAS F. GROAK.

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Mr. Detenberberg did, in fact, act as

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attorney at the trial for the defendant,
AMERICAN BUSINESS INDUSTRIES INTER-
NATIONAL, INC.

(b) EDMUND A. ROSNER. Mr. Rosner was retained by deponent and deponents records turned over to him. Mr. Rosner filed a motion for discovery upon behalf of the deponent, but never filed a notice of appearance. Mr. Rosner was indicted in this Court on July 5, 1972 (72 Crim. 782). His trial extended from November 20 to December 5, 1972 and resulted in conviction. For obvious reasons, he was not able to represent deponent further.

(c) JOHN C. CORBETT. On June 18, 1973, Mr. Corbett was appointed as counsel for deponent and represented deponent at the trial conducted from June 21 to July 2, 1973. He applied to the Court of Appeals to be removed as counsel for deponent but that motion was denied.

3. In December, 1972, upon the recommendation of the Bar Association, as indicated by the letter of which a copy is annexed as Exhibit A, deponent had approached John C. Corbett with a request that the latter act as counsel for deponent. On January 15, 1973, Mr. Corbett wrote as follows:

//

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schedule will not permit me to
undertake the defense of your case.

I am presently on trial in the
Federal Court and have three other
trials which must follow the case
on trial. It would be several
months before I would have time to
start the preparation of your case.

Very sincerely yours,

John C. Corbett"

4. Nevertheless, Mr. Corbett was appointed as
deponent's counsel on June 18 and represented deponent at
the trial which commenced June 21, 1973. Nevertheless,
deponent was not given the opportunity to discuss the case
with his counsel, to prepare counsel for the trial. This
was a complex case. The Government introduced 34 witnesses
and 184 exhibits. The defense was totally unprepared, and
presented no substantive evidence whatsoever.

5. A pre-trial conference of attorneys was
held before the HONORABLE LEE P. GAGLIARDI on May 31, 1973.
Neither before nor after that conference was deponent
advised of it by his counsel. News of it came to deponent
after trial from a transcript filed on August 15, 1973.
One purpose of the conference was to establish a trial date.
At the conference Mr. Corbett revealed that he did not have
deponent's records, not so much as a copy of the indictment.
Further, that he would be occupied with the trial of
another case for two of the intervening weeks.

P. 11 "MR. CORBETT:...I am starting a
trial...we are starting on the
11th before Judge Wienstein. I
expect two weeks will be the most
for that, although we do have a
whole ship's crew there...."

P. 13 "MR. CORBETT: MR. NICHOLS, will you be able to give me a copy of the indictment? Most of Mr. Bekeny's things are in Mr. Rosner's hands."

6. Deponent received a telephone call from Mr. Corbett at about 4:30 P.M. on or about June 14, 1973. Mr. Corbett stated that Judge Gagliardi wanted to appoint him as counsel for deponent. Deponent was asked to come to Mr. Corbett's office to sign some papers relative to the appointment. Deponent went to Mr. Corbett's office the following day and signed a set of forms prepared by Mr. Corbett. Deponent was told that there would be a hearing, but not the trial, the following Tuesday, June 19. It was arranged that Mr. Corbett would telephone deponent to arrange an office conference for the following day, Saturday, June 16. Mr. Corbett did not telephone. On Monday, deponent was advised of the postponement of the "hearing" to June 21. However, no conference was ever held between deponent and Mr. Corbett in advance of the trial on June 21 to July 2, 1973.

7. As mentioned previously, deponent had turned over to Edmund Rosner records and documents relevant to the defense in anticipation that Mr. Rosner would represent deponent at the trial. Mr. Rosner had also developed some information on the basis of his discovery motion. Mr. Corbett apparently never obtained these papers nor made any effort to read them. At page 13, lines 12-14 of the minutes of the hearing held on May 31, 1973 before the HONORABLE LEE P. GAGLIARDI, Mr. Corbett states:

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be able to give me a copy of the indictment? Most of Mr. Balkony's things are in Mr. Rosner's hands."

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In a post-trial affidavit dated July 31, 1973, submitted in conjunction with a motion for leave to re-argue, he states the following:

"The trial of this defendant was first scheduled for October 10, 1972 then adjourned to November 20, 1972 and then to December 4, 1972. Following these adjournments, the case was set down for January 30, 1973. These dates have been furnished to your deponent by the defendant, PETER M. BEKEFNY, because of the fact that the indictment of Rosner has made his files unavailable."

8. To the best of deponent's knowledge, Mr. Corbett did not attempt to interview a single witness or potential witness in advance of the trial or in advance of their giving testimony at the trial. Deponent prepared a list of approximately 22 witnesses which he desired to have testify at the trial. Nothing was done to make this testimony available to the Court until the recess at the end of the day on June 27, 1973. (transcript pages 681 and 755). At that time Mr. Corbett wrote out by hand three subpoenas directed to the Reverend Dean Andrew Harsany, of Carteret, New Jersey; Joachim Prinz of Hamburg, Germany; and Doctor Laszlo Varga of New York City. Mr. Corbett told deponent to serve the subpoenas himself. Deponent did attempt to serve Dr. Varga. However, when deponent delivered a copy of the subpoena to Dr. Varga, the latter, a lawyer, rejected it saying that deponent was not entitled to serve subpoenas in his own case. The attention of the deponent has been called to Rule 17(d) of the Federal Rules of Criminal Procedure. Copies of the subpoenas, as prepared by Mr. Corbett, are annexed hereto as Exhibit B. C. 7.

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9. The defense presented by Mr. Corbett consisted of one exhibit and two witnesses. It is apparent from the record that Mr. Corbett had not spoken with the witness, Harsinyi, prior to the appearance of the witness on the stand. Mr. Corbett did not qualify him as a character witness and, accordingly, his evidence was ruled inadmissible. The direct testimony of the second witness, Leslie Keskenneti, was less than a full page in length (transcript page 001-2).

10. The circumstances behind this case are that AMERICAN BUSINESS INDUSTRIES INTERNATIONAL, INC. went about recruiting a sales organization in the latter half of the year 1970. It sought persons willing to become "distributors" who would go overseas and sell to foreigners "royalty acreage" and interests in "limited partnerships". These two forms of investment represent participation in the development and production of oil in the United States. They are forms of investment which have been sold within the United States by many organizations. AMERICAN BUSINESS INDUSTRIES INTERNATIONAL, INC. was to provide the sales organization. The investments to be marketed were the subject of agreements reached with Pyramid Corporation, Inc. on or about August 21, 1970; American Marine Continental Oil Corp. on or about October 30, 1970; Platte Valley Oil Company, Inc. on or about August 3, 1970; and Kathol Petroleum Company on or about January 1, 1970 and April 10, 1970. Copies of these agreements are annexed hereto as Exhibits E, F, G, H & I.

and entered into a contract with each of the "distributors". A training class was run for their benefit in New York. Transportation was provided to the country of their induction. Further training was provided for the majority in Germany. Defendant was himself in Germany from about January 1, 1971 to about April 12, 1971. Some royalty coverage and limited partnership interests were sold.

12. That John C. Corbett never understood the nature of the transactions is demonstrated by quotations from the brief which has been filed with the Court of Appeals. The rights to be sold by the distributors are variously described by Mr. Corbett as "shares in the oil venture", "the shares", "the stocks". The rights that were to be marketed were (a) limited partnership interests in oil wells and (b) participation in oil and gas leases, commonly identified as "royalty acres".

13. The indictment charged defendant and his co-defendants with mail fraud. The Government's case relied upon the ultimate failure of the sales venture as proof to the jury of the initial intent of the defendants. Defendant had a defense. Defendant invested and lost his own money. The Corporation spent money in setting up the venture, incorporation in Germany, printing, market research, office space, transportation and living expenses for "distributors". These facts could have been established by competent witnesses for the defense but were not.

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In the indictment also charged defendant with perjury before the Grand Jury. Defendant is Hungarian by birth, having fled that country following the communist take over. Although I do speak English, my speech and my comprehension are not as accurate as they should be, particularly with respect to niceties of the language.

The Grand Jury testimony was through a Yugoslavian Interpreter. Accordingly, the words recorded by the stenographer were his, not the Hungarian which I endeavored to answer and which I spoke. Nevertheless, the interpreter who was not interviewed by my attorney, was not called as a witness, despite my request to him that he do so.

WHEREFORE, defendant respectfully asks this Court to grant a new trial of this matter upon the grounds that defendant was not afforded adequate representation at the trial.

John Wey

Sworn to before me
this 26th day of January, 1974

Arthur McGuire Doal, Jr.
ARTHUR MCGUIRE DOAL, JR.
Notary Public, State of New York
No. 50-5580050
Qualified in Westchester County
Certified in New York County
Commission Expires March 30, 1974

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THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

ORVILLE H. SCHELL, JR.
PRESIDENT
1 WALL STREET
NEW YORK 10006

August 7, 1973

Mr. Peter M. Bekeny
218 Pinebrook Blvd.
New Rochelle, New York 10804

Dear Mr. Bekeny:

Mr. Haydock has informed me that at the time you inquired about Mr. Rosner's qualifications, you had had referrals to three lawyers on the Legal Referral Service panel, any of whom were qualified to represent you. These referrals were accomplished in the regular way; you were furnished with name, address and telephone number. As an accommodation to you, Mr. Haydock made an informal check on Mr. Edmund Rosner's qualifications. These indicated a lawyer of ability and experience with a background on the staff of the Legal Aid Society handling criminal cases. The indictment, later dismissed, did not come to light. This was in 1971. Mr. Rosner was indicted again in 1972 and his subsequent conviction made it impossible for him to represent you. When this situation became apparent, the Service undertook to find you another lawyer. After referral to several qualified members of the panel, you were able to make arrangements to retain your present counsel, Mr. John C. Corbett.

Sincerely,

Orville H. Schell, Jr.

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ROOM 2703

ASSISTANT U.S. ATTORNEY

United States District Court

FOR THE

Southern District of New York

UNITED STATES OF AMERICA

v.
PETER M. BOKONY

No. 71 Cr. 234

To Rev. Dean Andrew Harkavy
175 Pompton Avenue
Paramus, New JerseyYou are hereby commanded to appear in the United States District Court for the
District of New York at Foley Square, N.Y.C. in the city of
New York on the 2nd day of July 1973 at 9:30 o'clock A.M. to
testify in the above-entitled case.This subpoena is issued on application of the DEFENDANT

June 27, 1973.
Subpoena
for Defendant
at Clerk
Address
New York, N.Y.

RAYMOND P. DIAZ

Clerk

By *R. Diaz*

Deputy C.

RETURN

Received this subpoena at _____ on _____
 and on _____ I served it on the _____
 within named _____
 by delivering a copy to _____ and tendering² to _____ the fee for one day's attendance and the mileage
 allowed by law.

Service Fees

By _____

Travel _____ \$ _____

Services _____ \$ _____

Total _____ \$ _____

¹ Insert "United States," or "defendant" as the case may be.² Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

Subpoena to Testify

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Cr. Form No. 20 (Rev. 5-68)

July 27, 1973

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U.S. District Court

FOR THE

Southern District of New York

UNITED STATES OF AMERICA

v.
Peter M. Saksenky

} No. 71 Cr 234

To Dr. LACZLO VARGA, New York City

You are hereby commanded to appear in the United States District Court for the Southern
District of New York at Foley Square, N.Y.C. in the city of
New York on the 2nd day of July 1973 at 9:30 o'clock A.M. to
testify in the above-entitled case.

This subpoena is issued on application of the Defendant

June 27, 1973.
John D. Calot
Attorney for Defendant
U.S. District Court
Address
New York, N.Y.

RAYMOND F. BURGATTA,

Clerk.

By B. Edwards, Jr.,
Deputy Clerk.

RETURN

Received this subpoena at _____ on _____
and on _____ at _____ I served it on the
witness named _____
by delivering a copy to _____ and tendering² to _____ the fee for one day's attendance and the mileage
allowed by law.

Service Fees

By _____

Travel _____ \$ _____
Services _____
Total _____ \$ _____

¹ Insert "United States," or "defendant" as the case may be.

Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof, 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

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Subpoena to Testify

Cr. Form No. 20 (Rev. 5-6-64)

Room 2703
U.S.D. L.P. Gagliano, United States District Court

20

FOR THE

Southern District of New York

UNITED STATES OF AMERICA

v.
PETER M. BEKESY

No. 71 Cr 234

To Joachim Prinz

You are hereby commanded to appear in the United States District Court for the ~~Southern~~
 District of New York at Foley Square, N.Y.C. in the city of
New York on the 2nd day of July 1973 at 9:30 o'clock A. M. to
 testify in the above-entitled case.

This subpoena is issued on application of the Defendant.

July 27, 1973
Paul Becker
 Attorney for

Defendant

Address 66 Court Street Brooklyn RETURN

RAYMOND F. D'ANGELO

Clerk

By B. Glavin,
Deputy Clerk

Received this subpoena at _____ on _____
 and on _____ at _____ I served it on the _____
 within named _____
 by delivering a copy to _____ and tendering² to _____ the fee for one day's attendance and the mileage
 allowed by law.

Service Fees

By _____

Travel _____ \$ _____

Services _____ \$ _____

Total _____ \$ _____

¹ Insert "United States," or "defendant" as the case may be.

² Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

21

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

VS

71 CRIM 627

PETER M. BEKENY, KENNETH GLASSMAN,
and AMERICAN BUSINESS INDUSTRIES
INTERNATIONAL, INC.,

Defendants,

STATE OF NEW YORK)
 O ss.:
COUNTY OF NEW YORK)

ARTHUR M. BOAL, JR., being duly sworn, deposes and says:

1. That he is an attorney at law admitted to practice before this Court and a member of the firm of BOAL, BOHL & LARSEN, with offices at No. 225 Broadway, New York, N.Y.

2. That he executes this affidavit in support of the motion by the defendant, PETER M. BEKENY, under 28 USC 2255, and for other relief, and appears herein upon behalf of the said defendant.

3. That the docket of this Court records that the defendant, PETER M. BEKENY, was arraigned upon the indictment on April 14, 1971; that John C. Corbett, 66 Court Street, Brooklyn, New York was assigned as counsel for the defendant on June 18, 1973; that the matter was tried before the HON LEE P. GAGLIARDI and a jury on June 21 to July 2,

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the twenty-one counts of the indictment on July 2, 1973 and
sentenced by the Court on October 11, 1973 to imprisonment
for a term of 18 months. A notice of appeal was filed herein
on October 11, 1973 and, as of the date of this affidavit,
that appeal remains pending. Argument has been scheduled
for February 13, 1973. The defendant has remained free on
bail pending the appeal.

22

4. That although the case against this defendant is
now before the Court of Appeals, the statute under which
this application is made requires that it be made to the
court which imposed the sentence. 28 USC 2255.

5. That the defendant states in his affidavit that he
had no opportunity to consult with his assigned counsel
before going to trial. This assertion appears to be
correct from all the information available to defendant
including the transcript of the trial itself which defendant
has read. No defense on the merits was presented. Thus
the form of counsel's questioning of the two character
witnesses, it is obvious that counsel had not conferred
with either prior to their taking the stand. Under the
circumstances the following decisions are applicable:

"One of the essentials of providing an
accused with adequate legal representation
is sufficient time to prepare a defense.
The Fourth Circuit has not hesitated to
void a conviction where court-appointed
counsel have not been given or have not
taken time deemed necessary for preparation."
Bryant v. Peyton (W.D.Va., 1967) 270 F.Supp.
555.

"Though factors such as the failure to con-
tact potential defense witnesses, the failure
to talk to anyone except the prosecuting
attorney and the police, and failure to
investigate in greater detail the circum-
stances surrounding both the crime and the
confession, when considered separately may

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Commonwealth, (4th Cir., 1968) 365 F.2d 549,
552.

23

6. That under the facts of this case, all distinctions between "newly discovered evidence" and evidence available at the trial disappear. The defendant could not, without acting as his own attorney, introduce evidence his counsel ignored. The defendant was powerless, without the cooperation of his attorney, subpoena witnesses or take their depositions. The rules now state that a defendant shall not be forced to act as his own attorney, that the accused has the right to representation by legal counsel. The transcript of the trial runs to 1157 pages, the prosecution introduced 184 exhibits through 54 witnesses. We believe these facts speak for themselves. No attorney can adequately prepare an effective defense to a case of that magnitude without extensive conferences with his client, interviews of defense witnesses, legal research. Certainly the time between appointment on June 10, 1973 and trial on June 21, 1973 (two business days) would have been insufficient. If the assigned counsel gave any attention to the case prior to his appointment it is not apparent from the record. It is believed the following quotations provide inferences germane to the issue!

Transcript
pages 6-7

MR. CORBETT: ... Mr. Belkny has informed me that he has witnesses in so many, and with some of them he has lost contact because of the long time that this matter has been pending. ...

* * *

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page 541.

holding up a folder with some documents on it, whatever record we have Mr. Bekeny gives me while the witness is testifying and before the witness is testifying. When this witness started testifying Mr. Bekeny told me that he looked everywhere and has no record of Quintana."

24

Transcript
page 681

MR. CORBETT: ... I am going to send subpoenas out this evening. I will have to bring my witnesses in on Friday ...

... then there will be a question of the interpreter who interpreted for him at the grand jury. I will subpoena him. Whether I will use him or not, Judge, I don't know ...

* * *

Transcript
page 755.

MR. CORBETT: I make the same application on behalf of the defendant Bekeny who is (sic) a witness in Germany, Joachim Prinz.

THE COURT: I know of no way in which I can authorize the disbursement of funds to provide transportation of somebody from Germany on such an application as you have presented here. I don't think that the application is timely and no facts are presented to me in which I may pass upon this application.

7. The prospective witness, Joachim Prinz, was one of the distributors who, as indicated by the letter attached, succeeded in effecting sales of the interests of the OII Group Company.

8. Upon the trial of this matter, one of the witnesses called by the Government was Max Weiss. On cross examination the witness denied ever being in the Wermacht (page 963). This factor and its disproof formed the subject of a motion for a new trial upon the basis of newly discovered evidence. It is also demonstrable that the following testimony is false: (page 967)

Q. And you signed all the tax forms?

A. I didn't sign tax forms.

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Attached hereto are copies of forms which appear to bear ~~the~~ signature of the witness. These forms, and this testimony bear directly upon one of the issues raised by the charge of perjury, to wit, the question of whether the defendant Bekeny exercised sole control of the corporation.

WHEREFORE, it is respectfully prayed upon behalf of the defendant, PETER M. BEKENY, that verdict and judgment herein be set aside and a new trial granted, or, in the alternative that this motion be set down for a hearing at which the defendant can be present and present evidence in support of this application.

D. H. McRea Jr.

Sworn to before me this
5th day of February, 1974

Megh E. Doty
Notary Public

STATE OF NEW YORK
Suffolk County, New York
On the 5th day of
February in County
of Suffolk, New York,

Joachim Prinz

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Grosse Alice 10
Germany

26

American Business Industries
International, Inc.
50 East 42nd Street
New York, N.Y. 10017
U. S. A.

March 18, 1971

Re: Oil Group Company

Gentlemen:

Enclosed please find an application in the name of Dr. Guenther Naundorf and Ursula Naundorf of 2 Hamburg 70 Friedrich Ebert Damm 30, for the purchase of an Overriding Royalty Assignment, covering 10 acres.

Attached you will find an American Express check of \$362.50 payable to The Oil Group Company.

Please send the confirmation to Dr. Naundorf as soon as possible.

I would appreciate your sending my commission for this sale, in one check payable to me, to the above address as soon as possible.

Sincerely,

Joachim Prinz
Joachim Prinz

SOUTHERN DISTRICT OF NEW YORK

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27

UNITED STATES OF AMERICA

Plaintiff

AFFIDAVIT

-against-

PETER M. BEKENY, KENNETH GLASSMAN,
and AMERICAN BUSINESS INDUSTRIES
INTERNATIONAL, INC.

71 Crim. 284

L.P.G.

FILED

Defendant

FEB 14 1974

STATE OF NEW YORK)

)SS.:

COUNTY OF KINGS)

U.S. DEPT. OF JUSTICE
FEB 14 1974

JOHN C. CORBETT, being duly sworn, deposes and says:

1. I am assigned counsel for the defendant, PETER M. BEKENY, and make this affidavit in partial answer to the motion made by the defendant, PETER M. BEKENY, under Title 28 United States Code, Section 2255.

2. I will not answer the moving affidavit or the affidavit of ARTHUR M. BOAL, JR., point by point. This Court set as trial judge in this trial and is well aware of all of the facts and circumstances surrounding this case.

3. The within case appeared before the United States Court of Appeals for argument of the appeal on February 13, 1974, the panel consisting of JUDGES MANSFIELD, ANDERSON and OAKES. At the conclusion of the argument, JUDGE MANSFIELD informed your deponent that your deponent had performed his duty as advocate for the defendant well but that the Court was affirming from the Bench as the evidence of the defendant's guilt was overwhelming.

4. It is felt that this motion is merely a desperate effort on the part of this defendant to avoid the consequence of his conviction after trial.

(38)

5. As I said, I will not answer this question until it is put to me.

28

give this Court an example of the material on which the motion is based, the Court is respectfully referred to Paragraph 9 of the moving affidavit on Page 6 wherein the defendant says that it is apparent from the record that I did not speak with the witness, the REV. ANDREW HARSINYI in order to prepare him prior to the trial. The REV. HARSINYI was a clergyman brought by the defendant as a character witness. The defendant states "it is apparent from the record" but he neglects to state that he was present when I conferred with the REV. HARSINYI who came as an extremely reluctant character witness. When I started to talk to the REV. HARSINYI about his testimony he immediately told me that he knew the defendant as a member of the Hungarian Knights of Malta and that he knew nothing of his business or of his character or of his reputation and could not testify to that. He could not and would not testify as to his reputation in the community. However, the REV. HARSINYI had come to the Court as a character witness, made an excellent appearance and I made the decision to try to use him, if possible. The reading of the record will show that the REV. HARSINYI was making every effort to avoid making any comment on BEKENY'S character. He was only willing to testify that he knew him in the Order of the Knights of Malta and nothing further could be done with him.

6. Trial counsel must work with the evidence available. I had urged the defendant BEKENY to call as character witnesses people who knew him from the community in which he resided. I told him to call friends and reminded him that producing no character witnesses is better than producing character witnesses who are reluctant to testify on his behalf. His answer to me was that he was known in his community as a "distinguished European", belonged to clubs where he had a good reputation and that he was unable to

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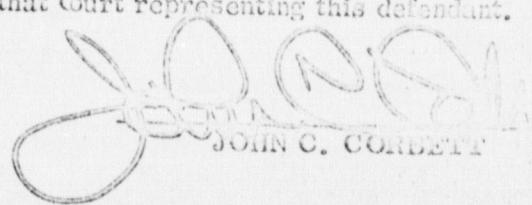
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bring any of the people of his community because he did not wish to be identified
of the charges made against him.

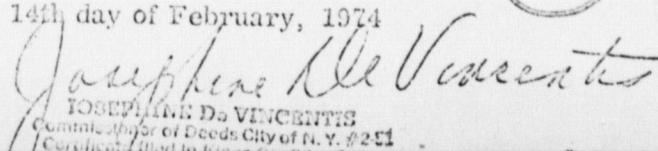
7. The affidavit of ARTHUR M. BOAL, JR., ESQ. in Paragraph 6
points out that "no defense on the merits was presented". This is not a civil
case where affirmative defenses are customarily interposed regardless of
their merit. This was a criminal trial and defenses "on the merits" can not
be manufactured if none exist.

8. I have been a member of the Bar of the State of New York
since March, 1941 and have been a member of the Bar of the Southern District
since June, 1947. Since leaving the United States Army in 1946, I have
been constantly engaged, for the past 28 years, as trial counsel in criminal
cases. I gave my best efforts to this defendant as I do in all cases. The true
complaint of this defendant and his new counsel is that he did not receive an
acquittal.

9. It is interesting to note that the moving papers were brought
to the United States Court of Appeals by the defendant BEKENY several days
prior to the argument of the appeal and that MR. BOAL wrote a letter to the
United States Court of Appeals stating that the moving papers were submitted
for the information of that Court on the ground that this application may have
an effect on the handling of the appeal. This of course was a blatant attempt
to take the matter from the hands of the District Court and was quite properly
ignored by the panel of the United States Court of Appeals handling the case.
I might venture the thought that the presentation of this application to the
United States Court of Appeals prompted the statement of the Presiding Judge that
I had done my duty as advocate in that Court representing this defendant.


JOHN C. CORBETT

Sworn to before me this
14th day of February, 1974


JOSEPHINE DE VINCENTIS
Commissioner of Deeds City of N.Y. #251
Certified and filed in book

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SOUTHERN DISTRICT OF NEW YORK

30

UNITED STATES OF AMERICA

-v-

PETER M. BEKENY,
KENNETH GLASSMAN and
AMERICAN BUSINESS
INDUSTRIES INTERNATIONAL, INC.,

AFFIDAVIT

71 Cr. 234
L.P.C.

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JOHN W. BUSH, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney and as such have been placed in charge of the above-captioned case. I make this affidavit in opposition to defendant Bekeny's motion, made pursuant to Title 28, United States Code, Section 2255 and Rule 33 of the Federal Rules of Criminal Procedure, to set aside the judgments of conviction entered against him because (a) he was denied effective assistance of counsel, and (b) he has found new evidence.

2. To assist in the determination of this motion, a brief review of the background of the case to date may be helpful:

a. Indictment 71 Cr. 234, filed March 2, 1971, charged Bekeny and two co-defendants in 17 counts with violating the mail fraud provisions of Title 18, United States Code, Section 1341; Bekeny alone was also charged in four counts with committing perjury before the Grand Jury investigating his conduct, a violation of Title 18, United States Code, Section 1623.

27

1973 the jury returned a guilty verdict on all counts.

the eight mail fraud counts which it had been asked to consider and on each of the four perjury counts. On October 11, 1973, the Court sentenced Bekony to consecutive 10 month terms of imprisonment on the counts on which he had been found guilty.

c. Following the date of sentencing, Bekony moved to appeal his convictions. On February 13, 1974, the Court of Appeals affirmed those convictions in open court without written opinion.²²

3. With respect to the issue of the adequacy of his representation at trial, Bekony contends that his trial counsel prepared inadequately to defend the case and that he was in any event given an inadequate amount of time to prepare a defense. An examination of the voluminous trial record does not lend credence to the first half of Bekony's argument. Indeed, given the evidence in the case, his counsel did as good a job in defending Bekony as could be expected.²³ As for the second part of Bekony's argument, his counsel, while perhaps only officially appointed as such on June 18, 1973, was for all practical purposes engaged to defend Bekony in the case at least as early as May 31, 1973, a date sufficiently early to allow the case to be prepared for trial. See the transcript of the pretrial conference held on May 31, 1973, a copy of which is attached hereto as Exhibit A.

(Parenthetically, because Bekony's motion was filed with this Court before the Second Circuit had acted, it would appear that this Court at the time the motion was filed lacked jurisdiction to consider it. In light of the quick disposition of the case on appeal, however, the Government chooses not raise this issue herein.)

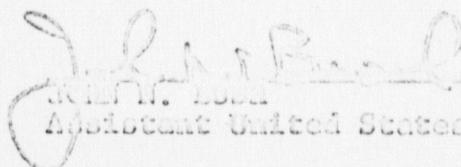
²²In affirming Bekony's conviction, Judge Mansfield complimented defendant's trial counsel for doing the job he had done in defending Bekony.

32

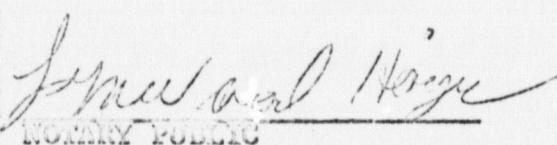
Finally, assuming arguendo Bekeny's motion is deemed to have some merit, it hardly meets the standards controlling in this Circuit for setting aside a guilty verdict by reason of ineffective counsel. See United States v. Mancusi, 462 F.2d 36 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973) and the cases collected therein at pp. 42-45.

4. The purported newly discovered evidence found by Bekeny -- certain forms signed by one Max Weiss and filed with various governmental bodies -- hardly seems to contradict the testimony given at trial to which it presumably relates, could not conceivably have been unknown to defendant before the trial began and could not have had any perceptable impact on the outcome of the case.

In view of the foregoing, the Government submits that defendant Bekeny's motion should be denied in all respects.


John H. Breen
Assistant United States Attorney

Sworn to before me
this 21st day of February, 1974


Lynwood Rovers
NOTARY PUBLIC

LYNWOOD ROVERS
Notary Public, State of New York
No. 41-1720825
Qualified in Queens County
Certified in New York County
Commission Expires March 30, 1975

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1 hmch

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x
5 UNITED STATES OF AMERICA :

6 vs. :

71 Crim. 234

7 PETER M. BEKENY, KENNETH :
8 GLASSMAN and AMERICAN BUSINESS :
9 INDUSTRIES INTERNATIONAL, INC., :

10 Defendants. :

11 New York, New York
12 May 31, 1973 - 4:00 p.m.

13 BEFORE:

14 HON. LEE P. GAGLIARDI,

15 District Judge

16 APPEARANCES:

17 WHITNEY NORTH SEYMOUR, JR., Esq.,
18 United States Attorney for the
19 Southern District of New York,
20 By: JOHN W. NIELDS, JR., Esq.,
21 Assistant, United States Attorney.

22 JOHN C. CORBETT, Esq.,
23 Attorney for Defendant Peter M. Bekeny.

24 JULIAN DENENBERG, Esq.,
25 Attorney for Defendant American Business
Industries, International, Inc.

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1 lhnach

2 THE CLERK: U.S.A. vs. Bekeny and others.

3 MR. NIELDS: The Government is ready, your Honor.

4 I understand that -- .

5 THE COURT: Mr. Corbett, you are representing
6 Mr. Bekeny?

7 MR. CORBETT: For some time Bekeny has been after
8 me to be his lawyer.

9 THE COURT: I can see that. I have read the
10 whole file here. We are not beyond the six months' rule
11 here, we are beyond the six year rule.

12 MR. CORBETT: Bekeny has had no lawyer up to
13 this point so the rule doesn't apply to him.

14 THE COURT: This is a '71 indictment, we ought
15 to dispose of it. Granted that neither the Court nor the
16 U.S. Attorney has been lax in here, the circumstances --

17 MR. CORBETT: And I will state for the record
18 that so far as the Defendant Bekeny is concerned, neither
19 the United States Attorney's Office nor the Court has been
20 lax in this matter.

21 THE COURT: Now here it is and we are faced
22 with this old indictment, and I just got it. The other
23 day my oldest case was only two or three months old and
24 now my oldest case is two or three years old.

25 MR. CORBETT: If you are worried about this, Mr.

1 1hach

3

2 Nields -- I don't know where I got the idea this case would
3 take six weeks to try but Mr. Nields took a load off my
4 mind by saying it would be two, two and a half weeks, the
5 most.

6 THE COURT: Do you represent Bekeny? Can you
7 file -- I think you ought to file a notice of appearance.

8 MR. CORBETT: Judge, he has no money to pay me.
9 That's the problem.

10 THE COURT: You are on the panel. If you want
11 to submit the affidavits, I have no hesitancy in assigning
12 you. I will be delighted to, actually. I think you do
13 a competent, capable job.

14 MR. CORBETT: Thank you, Judge. I am very
15 pleased to hear you say that.

16 THE COURT: I am aware of that, from my experience
17 What about the corporate Defendant?

18 MR. DENENBERG: If your Honor please, I am
19 listed as attorney for the corporation.

20 THE COURT: Mr. Denenberg?

21 MR. DENENBERG: Yes. I have a motion from
22 October that Judge Croake had under advisement that he never
23 made a decision on to withdraw as attorney for the
24 corporation. The corporation is defunct. It is out of
25 business. It's been out of business since before the

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2 indictment, apparently.

3 MR. NIELDS: Your Honor, may I respond to the first
4 question and then the second?

5 THE COURT: Certainly.

6 MR. NIELDS: There was some question at the
7 time when Mr. Corbett first got involved in this case as
8 to whether Mr. Bekeny did or did not qualify under the CJA.
9 The way, as I recall, that it was worked out with Judge
10 Croake was that Mr. Corbett would eventually file a notice
11 of appearance once his name was put on the list, and if
12 it turned out that Mr. Bekeny in truth and in fact was
13 entitled to Criminal Justice Act treatment, then Mr. Corbett
14 would be paid that way, and if he wasn't then he would be
15 paid by Mr. Bekeny, but, in any event, Mr. Corbett
16 wouldn't be left holding the bag, so to speak. I would
17 just suggest, this has dragged on for quite awhile, and
18 I would suggest that just for the record perhaps it would
19 be well for Mr. Corbett to file a notice of appearance
20 today with the understanding that, of course, if Mr.
21 Bekeny is unable to --

22 THE COURT: Financially not responsible, we will
23 take care of it. Is there any reason you can't do that?

24 MR. CORBETT: Judge, I investigated Mr. Bekeny's
25 financial responsibility very closely and I can state for

1 Ihnach

2 the record that the only thing he was talking about was a
3 possible portion of a fee he paid to Mr. Rosner.

4 THE COURT: A refund on that.

5 MR. CORBETT: I spoke to Rosner on it but at
6 the time he was awaiting sentence, and he was rather
7 vague about sending me anything. I would have no hesitancy
8 in presenting affidavits to Mr. Bekeny.

9 THE COURT: Just file a notice of appearance
10 and then we will take care of it. You submit the papers
11 and that will be taken care of.

12 Mr. Glassman --

13 MR. NIELDS: I believe Mr. Denenberg represents
14 the corporation. With respect to the corporation, there
15 was a motion made, I believe in December, it may have been
16 at the end of November, by Mr. Denenberg --

17 MR. DENENBERG: October, your Honor.

18 MR. NIELDS: I guess it should say it came
19 on and was heard by Judge Croake in his chambers, and the
20 Government opposed and we still oppose. I would candidly
21 state to the Court that we do not know whether the
22 corporation has assets or not, but we believe from the
23 evidence that we do have relating to Mr. Bekeny it is
24 by no means impossible that the corporation does have
25 assets. Up to now, the only indication that it doesn't

1 LIMACH
2 have assets is Mr. Bakeny's statement that it doesn't.
3 We believe that there would be no inconvenience caused
4 to the Court in terms of extra proof at trial and we would
5 like to retain or have your Honor retain the option, should
6 the jury find the corporation guilty, of imposing a fine
7 on the corporation in addition, and therefore we request
8 that it be retained as a defendant. It was indicted by the
9 grand jury and it is legally still in existence. We think
10 we are entitled to that. That's our position.

11 MR. DENENBERG: I have not ever had, nor do I
12 now have, access to any of the books, records or anything
13 of the corporation. I don't see how I can defend --

14 THE COURT: Let me suggest this to you, that
15 Mr. Corbett must certainly have access to the books, or
16 at least if Mr. Bakeny has them. I am not suggesting
17 that you do anything to compromise the interests of the
18 corporation here, but, nonetheless, maybe you gentlemen
19 can talk and find out what the situation is with respect
20 to that. There is no reason right now for me at this
21 moment to grant any motion to dismiss the indictment as
22 to the corporation, which I wouldn't do at this stage of
23 the game.

24 What about Mr. Barry Bell?

25 THE NIELDS: I telephoned Mr. Bell at the

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2 THE COURT: Reserved decision, yes.

3 How soon can everybody be ready for trial?

4 MR. NIELDS: Your Honor, the Government, of
5 course, has filed a notice of readiness.

6 THE COURT: So you are ready any time. You are
7 ready to go tomorrow --

8 MR. NIELDS: We would have a little difficulty
9 rounding up all of our witnesses in that short a period
10 of time. There are quite a few. Some of them have been
11 hard to find in the past. We prepared this case a couple
12 of times and then have been called off at the last minute
13 by Mr. Bekony's counsel problem.

14 THE COURT: I believe this is my schedule. I
15 am starting a case Monday morning and I don't know how
16 long that's going to last. It will only be a three or
17 four-day case. I had one scheduled for Wednesday which
18 is supposed to take two and a half to three weeks. This
19 case will follow that.

20 MR. DENENBERG: If your Honor please, is it
21 possible to put this on in July? I am going away in
22 June for a couple of weeks that I had planned long before.
23 I was also told by Mr. O'Connor, Judge Croake's secretary,
24 I will be given a month's notice on this. I have some
25 motions --

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2 THE COURT: This is my case now. I don't like
3 to see you caught in the middle of two judges, but
4 if I don't get it done then, I don't know when I am ever
5 going to reach it.

6 MR. DENENBERG: I have cases on this month.

7 THE COURT: You wouldn't be reached this month,
8 because it is still May.

9 MR. DENENBERG: You got me, but I would still
10 request on or about the middle of July. Since you are
11 not granting any of my motions, a simple application like
12 that can't hurt anybody.

13 THE COURT: All I suggest to you is before you
14 plan to go away in June, you check to see what my time
15 schedule is. If I can work that other case that was here
16 just before you in before yours, I will work it around that
17 way.

18 MR. NIELDS: Your Honor, I don't know whether
19 Government counsel has any vacation rights --

20 THE COURT: You are in a bad position because
21 if you are not ready to go, there ought to be somebody else
22 in your office to handle it.

23 MR. NIELDS: Your Honor, we will try that case --

24 THE COURT: I wouldn't be so difficult if it weren't
25 a 1971 case. Regardless of the fact that no one presently

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2 before the Court nor the Court itself is to blame for
3 this, nevertheless it is a '71 indictment. If we start
4 kicking it over again, we are going to kick it over, at least
5 so far as I am concerned, if we don't get it in in my
6 schedule as I have directed, we probably wouldn't reach
7 it until sometime in 1974. I am not going to permit that
8 to happen.

9 MR. NIELDS: I don't want there to be any chance
10 that my last remarks are misconstrued. I would like to
11 have this case tried just as soon as possible. I would
12 like to have it tried in June, if possible. In fact, I
13 was planning to go away toward the middle or end of July,
14 so that my personal and professional interests both could
15 indicate this case should be tried as soon as possible.

16 THE COURT: What's your vacation schedule, Mr.
17 Denenberg?

18 MR. DENENBERG: I am leaving on the 10th and
19 coming back on the 20th.

20 THE COURT: You look pretty safe.

21 MR. DENENBERG: I would like a few days to at
22 least get --

23 THE COURT: You can't get everything. You are
24 getting quite a bit as it is.

25 MR. DENENBERG: I have some other cases on in

1 lunch

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2 June also. The State still is trying cases in June, too.

3 MR. CORBETT: I am looking at my schedule,
4 Judge. As long as everyone tells a tale of woe, actually
5 I don't have too much of a sad tale to tell you. I am
6 starting a trial, the San Francisco Miguel, the Columbian
7 ship that unfortunately the crew members were accused of
8 bringing cocaine in, and I am defending one of the innocent
9 men and we are starting on the 11th before Judge Wiesensteiner.
10 I expect two weeks will be the most for that, although
11 we do have a whole ship's crew there. I should think
12 that Judge Wiesensteiner will --

13 THE COURT: Depending on what happens Monday,
14 Primary Day.

15 MR. CORBETT: Yes, depending upon what happens
16 Monday.

17 THE COURT: It looks pretty good for the 20th.
18 That is the way it looks, the way it will work into my
19 schedule. Unfortunately, it looks like one of those cases
20 that will take some time. We work 9:30 until a quarter of
21 5:00, and as long as we are working there is no sense in
22 dallying. We will look for you then. Get everything out
23 of the way. You get a hold of Mr. Bell and inform him as
24 though it looks as if this case will follow my next case,
25 beginning about the 20th of June.

2 MR. DENENBERG: I have some other motions
3 pending.

4 THE COURT: Still?

5 MR. DENENBERG: I never got a decision on anything
6 Judge. I just make motions.

7 MR. NIELDS: That's not quite true. Shortly
8 after the indictment was filed Mr. Denenberg made two
9 motions, one of them was to get certain records back and
10 the other was to dismiss certain counts of the indictment.
11 And the Government consented to the return of the records
12 and the indictment -- motion to dismiss the indictment
13 was denied.

14 THE COURT: I have seen the decision.

15 MR. NIELDS: Mr. Denenberg then made another
16 motion just about the time that the trial was scheduled
17 in November, maybe a few days after --

18 MR. DENENBERG: That was when I was denied or
19 I didn't get my decision on a motion to withdraw.

20 THE COURT: Why hasn't he gotten the records
21 back that were ordered in August?

22 MR. NIELDS: Most of the records were given back
23 to a representative of Mr. Bekany and the rest of them I
24 have informed Mr. Denenberg he can have at any time.

25 THE COURT: Why don't you go right down to your

2 office now and give them to him now, what you have?

3 MR. NIELDS: There are at this point, of course,
4 two weeks from the trial or three weeks from trial,
5 whatever we are, a lot of the records the Government plans
6 to use.

7 THE COURT: Give him photostats. Can you go
8 down and Xerox them now and give them to him now?

9 MR. DENENBERG: Will you send it over to my
10 office tomorrow afternoon?

11 MR. NIELDS: Yes.

12 MR. CORBETT: Mr. Nields, will you be able to give
13 me a copy of the indictment? Most of Mr. Bakeny's things
14 are in Mr. Rosner's hands.

15 MR. NIELDS: There you are.

16 THE COURT: All right, be prepared.

17 MR. DENENBERG: I also have a discovery motion
18 from November that I wanted certain information.

19 THE COURT: What information did you want?

20 MR. NIELDS: Your Honor, I believe the additional
21 piece of information which Mr. Denenberg is seeking is
22 the testimony of corporate employees before the grand jury.

23 THE COURT: What's your position on that, Mr.
24 Nields?

25 MR. NIELDS: Your Honor, I am prepared to consent

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2 to that on the basis of the Hughes case.

THE COURT: Fine. You will photostat that
together with the other records and give it to him.

All right? Taken care of? All right. The Bekeny case
to follow Wasserman, in no event earlier than June 20th.

All right.

MR. NIELDS: Thank you, your Honor. I will inform Mr. Bell. In fact, I have another message for him to call me in the morning.

THE COURT: You gentlemen have all your discovery motions in?

13 MR. CORBETT: I don't think I will have any
14 problems --

15 THE COURT: I don't want any motions on the
16 morning of the trial.

17 MR. NIELDS: I am not sure I know what no problem
18 means. I will be glad to give him everything --

19 MR. CORBETT: That's what I mean.

20 THE COURT: If you believe he is entitled to it,
21 give it to him right away.

22 MR. NIELDS: I certainly will. Your Honor.

23 (Court adjourned.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA, : 71 Cr. 234
-against- : MEMORANDUM
PETER M. BEKENY, : DECISION
Defendant. :
-----x

GAGLIARDI, D. J.

Petitioner, Bekeny was convicted of mail fraud and perjury following a jury trial lasting from June 21, 1973 to July 2, 1973. The conviction was affirmed without opinion by the Court of Appeals on February 13, 1974. Bekeny now moves for a writ of habeas corpus, pursuant to 28 U.S.C. §2255, and for a new trial, pursuant to Rule 33 Fed. R. Crim. P.

In support of his application for a writ of habeas corpus, Bekeny alleges that he was deprived of his right to the effective assistance of counsel as guaranteed by the sixth amendment to the Federal Constitution. The burden of establishing such a deprivation is heavy. See, United States ex rel. Marcellin v. Mancusi, 452 F.2d 36 (2d Cir. 1972), cert. denied 410 U.S. 917 (1973), and cases cited therein at pp. 42-43. The petitioner must show that the efforts of his counsel were "of such a kind as to shock the conscience of the Court

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and make the proceedings a farce and mockery of justice."

United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949),
cert. denied 338 U.S. 950 (1959).

Bekeny was defended at trial by John C. Corbett, Esq., an attorney experienced in criminal defense work. In January 1973, Bekeny first consulted with Mr. Corbett, and requested that the latter represent him. Mr. Corbett declined at that time stating that he was occupied with other cases. When Bekeny's case came up for trial six months later, however, Mr. Corbett was available and agreed to represent him.

The motion is supported by two affidavits, one of Bekeny and the other of his present counsel. Bekeny alleges that Mr. Corbett was not appointed his counsel until June 13, 1973, only three days prior to trial, an insufficient time to prepare the case. The record indicates, however, that a pre-trial conference was held on May 31, 1973, fully three weeks prior to the trial. Mr. Corbett attended this conference, and he agreed to act as counsel for Bekeny. Petitioner virtually concedes as much in a subsequent allegation in his affidavit wherein he cites Mr. Corbett's failure to inform him of this pre-trial conference as an example of Mr. Corbett's incompetence. Whether counsel has had sufficient time to prepare is a determination made on a case by case basis. United States v. Wight, supra. Three weeks was clearly sufficient time in this case.

Bekeny's present counsel faults Mr. Corbett's failure

to call witnesses and to otherwise present a defense "on the merits". Such allegations raise questions of trial tactics which is an inadequate basis for an attack on the competence of counsel. United States v. Garquilo, 324 F.2d 795 (2d Cir. 1963); United States v. Duhart, 269 F.2d 113 (2d Cir. 1959).

This Court presided at the petitioner's trial, and takes notice of the fact that Mr. Corbett performed his duties competently. See United States v. Katz, 425 F.2d 928 (2d Cir. 1970); United States v. Garquilo, supra. Moreover, Judge Mansfield commended Mr. Corbett for his efforts on behalf of the petitioner in the Court of Appeals. Whatever shortcomings, if any, may have been present in Mr. Corbett's representation of the petitioner, they were certainly not such as to "shock the conscience" of the court. United States v. Wight, supra.

Bekeny's motion for a new trial is based upon "newly discovered evidence." This evidence consists of photostatic copies of income tax returns of a certain corporation which were signed by a government witness. The returns allegedly show that the witness committed perjury when he stated at the trial that he did not sign the tax forms. They allegedly further show that Bekeny did not exercise sole control over the corporation, a question which Bekeny claims bears directly upon one of the perjury counts. This court is of the opinion that the evidence does not relate to any of the perjury counts, might have been used to impeach the government witness and,

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in any event, would not result in a different verdict if a new trial were granted. Moreover, inasmuch as the evidence could have been discovered earlier with due diligence, the motion for a new trial based upon its later discovery is without merit. United States v. Costello, 255 F.2d 376 (2d Cir. 1958).

For the reasons stated, Bakeny's motions are denied.

So Ordered.

U.S.D.J.

Dated: New York, New York
November 20, 1974.

